FOR ARGUMENT

Supreme Court, U.S.
FILED
APR 5 1996
CLERK

No. 95-489

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE and DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CAROL A. LAHAM
MICHAEL E. TONER
SCOTT S. HARRIS
WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Petitioners

April 5, 1996

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-489

COLORADO REPUBLICAN FEDERAL CAMPAIGN COMMITTEE
and DOUGLAS L. JONES, as TREASURER,
Petitioners,

v.

FEDERAL ELECTION COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

REPLY BRIEF FOR PETITIONERS

Petitioner Colorado Republican Federal Campaign Committee ("Colorado Party" or "Party") submits this Reply to the Brief for the Respondent Federal Election Commission.

The government does not—and really cannot—dispute that:

- The right of political parties to speak out in connection with federal elections lies at the very heart of the First Amendment.
- By limiting political parties to spending pennies-per-voter in connection with federal elections, § 441a(d) of the Federal Election Campaign Act ("FECA") severely curtails that core First Amendment right.[1]

---

[1] All statutory references are to Title 2 of the United States Code, unless otherwise noted. The government disputes whether

- The purposes reflected in § 441a(d)'s legislative history—to reduce and equalize political speech—are unconstitutional.
- There is no legislative finding or record evidence that limiting political party speech to pennies-per-voter prevents corruption or the appearance of corruption.
- No opinion of the FEC discusses the constitutional issues raised by its vague "electioneering message" standard, nor is the FEC entitled to deference on constitutional matters.
- The district court correctly found that "Wirth Facts # 1" was not "express advocacy."

The government and its supporting amici assert that political parties must be muzzled to prevent actual corruption or the appearance of corruption. The justification for such restrictions, however, has not been established.

I. THE GOVERNMENT HAS NOT ESTABLISHED THAT PARTY SPENDING LIMITATIONS ARE NECESSARY TO ACHIEVE A COMPELLING INTEREST AND ARE NARROWLY TAILORED TO THAT INTEREST.

The government cannot meet its heavy burden of justifying an infringement on core First Amendment rights by merely "posit[ing] the existence of the disease" called political corruption. *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1016 n.18, 1017 (1995) (noting record evidence produced by government). Instead, it must show that the alleged harms are real, and that the statute directly alleviates those harms. *Id.* Moreover, it must show that the statute is narrowly tailored and that less drastic measures will not suffice. *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 496 (1985) (*"NCPAC"*); *see also Shelton v. Tucker*, 364 U.S. 479, 488 (1960). The government's defense here does not meet these standards.

---

the party-spending limit is imposed by § 441a(d), but does not dispute the existence or severity of the limit.

A. Party Spending Limitations Are Not Necessary To Prevent Corruption Or The Appearance Of Corruption.

The government speculates (Br. 34) that party leaders might use party spending to corrupt candidates for the leaders' private financial benefit.[2] However, it offers no evidence that this has been a problem or that the potential injury is of a sufficient magnitude to justify sharply restricting the Colorado Party's fundamental First Amendment rights.[3]

---

[2] Contrary to the government's assertion (Br. 40 n.33), the Colorado Party has not "abandoned" its argument that the population-based expenditure formula under § 441a(d) belies an anti-corruption purpose. As demonstrated by limits recently announced by the FEC, the parties are permitted to spend $1,409,249 in connection with 1996 Senate races in California, but only $170,932 in Colorado. *See* FEC 22 *Record* 4 at 15 (Apr. 1996) If the underpinning of § 441a(d) were really that political party speech "corrupts" candidates, it stands to reason that such corruption would be taking place on a massive scale in California and other large states today.

[3] The government identified no evidence that modern political parties are actually corrupt or have the appearance of corruption. Amicus Common Cause (Br. 16) erroneously alleges that the Watergate Special Prosecution Force ("WSPF") found corruption between the Republican party and ITT Corporation. In fact, the WSPF investigation of ITT resulted in two criminal cases and neither included allegations of party corruption. *See* Watergate Special Prosecution Force Report 60 (Oct. 1975). The fact remains that the government has produced absolutely no evidence of modern political party corruption.

The two cases cited by the government for the proposition that parties can corrupt are far removed from this case. Justice Stevens' dissent in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), addressed the potential for corruption through patronage practices, and *Igneri v. Moore*, 898 F.2d 870 (2d Cir. 1990), concerned financial disclosure requirements for state employees. In neither case were the speech rights of parties at stake.

Contrary to the Respondent's argument (Br. 32 n.22), the legislative history of FECA contains evidence concerning the corruptive potential of large family-member contributions. *See, e.g.*, 119 Cong. Rec. S14724 (daily ed. July 25, 1973); Brief of Common Cause in *Buckley v. Valeo*, 424 U.S. 1 (1976), at 73.

Unable to show any *quid pro quo* abuses involving modern political parties, the government (Br. 35) defines as "corrupt" anyone "who seeks to exercise 'coercive influence' over the formulation of public policy [even if] motivated solely by a concern for the common good." By "coercive influence" the government means threatening to withhold party support. This argument assumes that parties have a duty to support candidates with whom they disagree. But refusing to speak out in favor of a candidate with whom one disagrees is not "corruption," it is democracy. *See* Brief of American Civil Liberties Union, at 14-17.

The government's new definition of corruption would condemn much classic democratic activity. Granting or withholding editorial support, endorsements, grassroots organizing and the like all are "coercive" in this sense. As this Court has repeatedly emphasized, "corruption" sufficient to justify infringing core political speech must involve "the financial *quid pro quo*: dollars for political favors," or at least the appearance of such corruption. *See NCPAC*, 470 U.S. at 497; *see also Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976). In fact, the broad "corruption" rationale now suggested by the government is merely a euphemism for the impermissible goals of reducing and equalizing political speech.[4]

B. Party Spending Limitations Are Not Necessary To Prevent Circumvention Of The Candidate Contribution Limits.

The government also speculates that limiting political party speech is necessary to prevent evasion of FECA's

[4] The amicus brief submitted on behalf of various states ("States' Brief") naturally expresses an interest in protecting "the integrity of the electoral process" in those states. *See* Br. 10-16. Despite the important constitutional difference between an expenditure *by* a political party and a contribution *to* a party, however, the States' Brief analyzes only the effect of large contributions allegedly prevalent in some states. This analysis is wholly irrelevant to the party spending limits at issue here.

limits on contributions to candidates. This is inconsistent with FECA's legislative history, which shows that the party limits were intended to complement the restrictions on expenditures that this Court struck down as unconstitutional attempts to reduce and equalize speech. *See* Colorado Party Opening Brief at 26-27.

Moreover, the government's theory ignores the stringent limitations that FECA imposes on contributions to parties for use in federal elections. As is discussed in the Colorado Party's Opening Brief (at 5), those contributions can come only from individuals and registered committees, are limited in amount, and cannot be earmarked for a particular candidate without counting as a direct contribution to that candidate (§ 441a(a)(8)). Thus, the most that the government can hypothesize (Br. 42) is that an individual "might" have an "expectation" that his or her publicly disclosed, limited contribution to a political party ultimately would benefit a candidate. Such an attenuated relationship resulting from multiple political support is not a compelling or even legitimate interest warranting a limit on the political speech of parties to pennies-per-voter.[5]

[5] Amicus Common Cause argues (Br. 10-11) that party spending limits are necessary to prevent Senate candidates from becoming beholden to donors who, notwithstanding § 441a(a)(8), can contribute up to $120,000 ($20,000 per year) to a national party during a candidate's six-year term in addition to the $2,000 statutory maximum to the candidate. This argument is misleading on several levels. First, individuals may not contribute $20,000 per year to a state political party like the Colorado Party. *See* § 441a(1)(C) (limiting annual contributions to $5,000). Second, individuals are limited to making $25,000 in total contributions to campaigns, PACs and party committees in any given year. § 441a(a)(3). Therefore, although an individual may contribute up to $20,000 per year in unearmarked funds to a national party, the individual would consequently be limited to contributing $5,000 to *all* other parties, PACs, and campaigns. Further, Common Cause ignores the impact of inflation on FECA's party-spending limits during the last two decades. In 1974 dollars, the Colorado Party's $5,000 contribution limit is worth only $1,618.12 today; the $20,000 limit to national parties is worth only $6,472.48. *See* FEC 22 *Record* 4 at 15 (Apr.

C. Amici Theories About "Soft Money" Are Unfounded And Irrelevant.

Recognizing that the contributions that parties can accept for federal purposes are too restricted to pose any risk of corruption, amici suggest that so-called "soft money" could provide an avenue for corruption.

"Soft money" is a nonlegal term that refers to funds that, by definition, are not and lawfully may not be used in connection with federal elections. *See* 11 C.F.R. § 106.5. These funds are not "contributions" or "expenditures" under FECA but are subject to state regulation.[6]

The government has not embraced amici's "soft money" theory. None of the funding for "Wirth Facts # 1" was "soft money." Nor, despite imaginative references by the Brennan Center for Justice (Br. 7, 10) to "bleeding" of "soft money" into federal campaigns, (which is illegal) is there any evidence that "soft money" is used for federal election purposes. The strict accounting required by FECA, *see* 11 C.F.R. §§ 102.5 & 106.5, makes such "bleeding" highly unlikely.

Amici's theory is that large donations of soft money can be used to addict a political party. The amici speculate that, once the party is addicted, the donor then can use the threat of withholding "soft money" to induce the party to spend additional "hard money" to support a particular candidate. Amici hypothesize that, when the candidate is informed of this, he or she will confer improper benefits on the "soft money" donors. Obviously, this supposed route to corruption is exceptionally attenuated and inefficient.

More importantly, amici's theory ignores the fact that, regardless of the outcome of this case, the total amount

---

1996). Finally, Common Cause did not cite a single example of such a contribution pattern in the 20 years of FECA.

[6] So far as the Party can determine, several of the six states joining in the States' Brief do not limit party speech.

of party speech in federal elections—the supposed vehicle for "soft money" corruption—will remain constrained by the parties' ability to raise money under FECA's existing contribution limits. Such contributions are the *only* lawful source for party expenditures in federal elections. "Soft money" does not corrupt federal candidates, and if it did Congress and/or the states would have to regulate it directly in a constitutional manner before limiting party speech.[7]

II. THE § 441a(a)(2) CONTRIBUTION LIMITATION, EMPHASIZED FOR THE FIRST TIME IN THE GOVERNMENT'S BRIEF, DOES NOT GOVERN THIS CASE.

For the first time in this proceeding, the government asserts (Br. 14-16) that this case is governed not by the expenditure limits of § 441a(d)(3), but by the contribution limits of § 441a(a)(2). Remarkably, during the last ten years no FEC pleading, memorandum, or brief relied upon § 441a(a)(2); none of the lower court opinions analyzed this case under § 441a(a)(2); and none of the amicus briefs supporting the government discuss § 441a (a)(2). In truth, § 441a(a)(2) is a red herring.

A. The Colorado Party's Counterclaim Addresses Only § 441a(d).

Party expenditures in connection with federal elections are regulated *only* by § 441a(d), not by § 441a(a)(2) or any other provision. Section 441a(d)(1) provides:

---

[7] Nor is there any validity to the argument pressed in the States' Brief (2-3, 24-25) that striking down party spending limits would "eviscerate" public financing of elections. Any ruling in this case will apply only to limits upon party spending in U.S. House and Senate races, where no public financing system exists. But even if party-spending limits were invalidated for those elections with public financing, both the federal and state governments have viable methods—many already in place—to check any potentially corruptive influence of contributions to the parties. Obviously, protecting public funding systems cannot justify limiting party speech to the extent the goal of such public funding schemes is to reduce and equalize speech.

> *Notwithstanding any other provision of law with respect to limitations on expenditures or limitations on contributions,* the national committee of a political party and a State committee of a political party, including any subordinate committee of a State committee, may make expenditures in connection with the general election campaign of candidates for Federal office, subject to the limitations contained in paragraphs (2) or (3) of this subsection. (emphasis added)

The Party's counterclaim seeks a declaratory judgment "that the limits on its expenditures in connection with the general election campaign . . . imposed by 2 U.S.C. § 441a(d) are unconstitutional. . . ." J.A. 68. It alleges that the Colorado Party "could and would have made expenditures directly in connection with the general election . . . that exceeded the limits established by 2 U.S.C. § 441a(d), but for the deterrent and chilling effect" of those limits. *Id.* Thus, solely at issue in the Party's counterclaim is the right to speak by making expenditures governed by § 441a(d).

The Colorado Party's counterclaim attacks only the *limits* imposed by § 441a(d), and it does so on the grounds that those limits improperly restrict the ability of political parties to communicate with their members and the public. Holding that the limits imposed by § 441a(d) unduly restrict party expenditures could not possibly support imposing even more stringent limits under § 441a(a)(2). In sum, § 441a(a)(2) has nothing to do with the Colorado Party's counterclaim.

B. The Government's Complaint Similarly Rests On The Claim That Expenditures For "Wirth Facts #1" Exceeded The Limits Of § 441a(d), Not § 441a(a)(2).

The FEC's enforcement action also stands or falls on the claim that the expenditures for "Wirth Facts #1" were "in connection with" a federal election and, hence, violated the limits established by § 441a(d). The probable cause finding that authorized this lawsuit accepted the recommendation of the FEC General Counsel to find a violation of § 441a(d). *See* FEC General Counsel's Brief, Matter Under Review 2186 (Nov. 6, 1987). Likewise, the probable cause letter that the FEC sent to the Party pursuant to the statutorily mandated conciliation process gave notice of a claimed violation of "the Act's limits at § 441a(d)." J.A. 181-84. Neither asserted a violation of § 441a(a)(2).

The FEC's district court complaint does not even mention § 441a(a)(2), but instead relies upon a claimed violation of § 441a(d). J.A. 51-60. The Colorado Party's Answer pleaded that the Party "has not violated 2 U.S.C. § 441a(f) because its disbursements for 'Wirth Facts #1' are not subject to 2 U.S.C. § 441a(d) limits." J.A. 67. The papers before the trial court and the court of appeals all treated as determinative the issue of whether the expenditures were "in connection with" a federal election within the meaning of § 441a(d), and both lower courts proceeded on that theory.

C. The Government's New Interpretation Of FECA Is Inconsistent With The Language Of The Statute And Its Implementation.

Not only is the government's argument that the Colorado Party violated § 441a(a)(2) new to this litigation, but that view has no basis in law. The text, structure, and historical application of FECA make clear that political party speech—regardless of its content—never implicates § 441a(a)(2)'s contribution limits. Speech by a party is limited, if at all, only by § 441a(d). The government's assertion that § 441a(a)(2) applies to party speech seeks to paint this case as one concerning contributions rather than expenditures in order to avail itself of the lower constitutional scrutiny afforded contributions in *Buckley*.[8]

[8] The government's use of this distinction is unduly formalistic. The First Amendment does not speak of "contributions" as less

FECA contemplates three categories of political party spending, each with its own legal ramifications. First, where a party transfers money or some other tangible thing directly to a candidate, that transfer is treated as a "contribution." § 431(8)(A). Like any other political committee, a political party is permitted to make only $5,000 in such contributions per election under § 441a (a)(2). Second, where a party makes an expenditure "in connection with" a federal election without providing any direct transfer to the candidate, that "expenditure" is subject to the limits of § 441a(d) ($103,248.54 for the 1986 Colorado Senate race). Finally, where a political party does not make a direct transfer to a candidate and does not make an expenditure "in connection with" a federal election, FECA imposes no limit at all.

The government's new litigation position—never adopted by the FEC or even advocated below—is that the first two of these categories are exactly the same (Br. 4 n.6 & 18 n.15) and that § 441a(d) merely authorizes additional "contributions." The government's view is based upon two provisions: (1) § 441a(a)(7), which generally treats an expenditure made in coordination with a candidate as a contribution to the candidate; and (2) 11 C.F.R. § 110.7(b)(4), which provides that expenditures by a party in connection with a federal election cannot be "independent expenditures."

Speech by a party, however, is *never* a "contribution" to a candidate. Section 441a(a)(7), "a provision of law with respect to limitations on contributions," simply does not apply to political parties by operation of § 441a (d)(1), which states:

> Notwithstanding any other provision of law with respect to . . . limitations on contributions, . . . a

protected than "expenditures." The Court in *Buckley* relied on the differing functions and characteristics of the types of disbursements before it. Regardless of how labelled, party speech under § 441a(d) has the essential characteristics of expenditures. *See* Colorado Party Opening Brief at 35-36.

> State committee of a political party . . . may make expenditures in connection with the general election campaign of candidates for Federal office . . . .

Thus, party "expenditures" are *not* subject to "contribution" limits.[9]

Recognizing this clearly expressed intent of Congress, the FEC has previously stated that § 441a(a)(2) does not apply to communications by the parties. FEC regulations provide that expenditures under the pennies-per-voter formula of § 441a(d)(3) "shall be in addition to any contribution by a committee to the candidate permissible under § 110.1 or § 110.2 [which implement the contribution limit]." 11 C.F.R. § 110.7(b)(3).

The view that party contributions are distinct from party expenditures has also been recognized in FEC Advisory Opinions—which the government treats as precedent. For example, FEC Advisory Opinion 1989-25, Fed. Election Camp. Fin. Guide (CCH) ¶ 5973 (1989), notes that:

> *Such limited expenditures may be made in consultation and cooperation with the candidates, but are not considered contributions to them.* See 2 U.S.C. § 441a(a)(7)(B) and 11 C.F.R. 110.7(b)(3), (b)(4). In addition, these limited expenditures may be made "[n]otwithstanding any other provision of law with respect to limitations on expenditures. . . ." 2 U.S.C. § 441a(d)(1).

[9] The Respondent in this Court apparently presumes that the Party asks for *all* of § 441a(d) to be declared unconstitutional. Throughout this litigation, however, the Colorado Party has argued only that the *limits* imposed by § 441a(d) on spending for Senate elections, found in subsection (3), violate the First Amendment. *See* Defendants' Answer and Counterclaims, J.A. 68 ("The State Party seeks a declaratory judgment pursuant to 28 U.S.C. § 2201 that the limits on its expenditures in connection with the general election campaign for the Office of United States Senator from the State of Colorado imposed by 2 U.S.C. § 441a(d) are unconstitutional. . . .").

Id. at 11,582 (emphasis added). *See also* FEC Advisory Opinion 1980-103, Fed. Election Camp. Fin. Guide (CCH) ¶ 5557 (1980) (while "moneys disbursed to the individual congressional candidates are contributions from the State party . . . subject to the $5,000 contribution limit," the party may also make expenditures "in connection with the general election" within the limits of § 441a(d)(3)).

In fact, FEC Advisory Opinion 1985-14, from which the government discerns its § 441a(a)(2) analysis, supports the same conclusion. Though the party speech at issue in Advisory Opinion 1985-14 was remarkably similar to the speech at issue here, *that opinion addressed only the application of the expenditure limitations in § 441a(d)(3).* While the opinion also considered whether the expenditures would be "attributable" to certain candidates under 11 C.F.R. § 106.1(a), the attribution analysis referred to allocating the costs of general anti-Republican advertisements to the *party expenditure limits* (*i.e.*, under § 441a(d)(3)) for the particular Democratic candidates who would benefit from the advertisements. J.A. 274. This analysis had absolutely nothing to do with the contribution limits of § 441a(a)(2). In fact, the Advisory Opinion specifically notes (J.A. 273 n.5) that the "expenditure" limits are "in addition to the limitation on contributions by DCCC pursuant to 2 U.S.C. § 441a(a)(2)(A)."

One simply cannot speak intelligibly of coordination between political parties and candidates. Because candidates are nominated by and are members of parties and because the very purpose of parties is to support candidates, they have no choice but to coordinate.[10] This does not mean, however, that political parties and candidates

[10] Because § 441a(d)(1) specifically exempts political parties from this "coordination" inquiry, this case will have no effect on application of the coordination inquiry to other entities such as PACs, labor unions, and corporations, which are not covered by § 441a(d)(1). The government's statement to the contrary (Br. 22) does not take this distinction into account.

have identical political views or that parties have nothing to say about public issues other than what candidates may say. To the contrary, parties are vitally interested in public issues and Congress assumed that parties would speak, both on issues and candidates, without being deemed to have made a "contribution." Indeed, the government acknowledges (Br. 3) that at the very least "generic" speech is "not subject to the Act's contribution limits," nor is party speech that does not contain an "electioneering message."

III. THE GOVERNMENT UTTERLY FAILS TO ADDRESS THE SIGNIFICANT VAGUENESS CONCERNS ASSOCIATED WITH THE FEC'S "ELECTIONEERING MESSAGE" STANDARD.

The government contends (Br. 44-45) that "people of common intelligence" would have no difficulty understanding that "Wirth Facts #1" contains an "electioneering message." Beyond that conclusory statement, however, the government fails to provide any definition of its "electioneering message" standard or to offer any meaningful distinction between "Wirth Facts #1" and the Colorado Party's other radio ads and pamphlets. These failures demonstrate in and of themselves that the construction of § 441a(d)(3) advocated by the government is unconstitutionally vague.

FEC v. Massachusetts Citizens for Life, Inc. ("*MCFL*"), 479 U.S. 238 (1986), held that the First Amendment requires § 441b(a)'s prohibition on corporate expenditures "in connection with" a federal election to be limited to "express advocacy" as defined in *Buckley*. Using identical language, § 441a(d)(3) forbids the Colorado Party from making any expenditures "in connection with" a federal election that exceeds a pennies-per-voter limit.

The government concedes (Br. 9 & 25-26) that its "electioneering message" standard is broader than the

"express advocacy" test.[11] The government cites no evidence that Congress intended the "in connection with" language of § 441a(d) to have a different meaning than its statutory twin in § 441b(a), nor does it deny that a narrowing construction of § 441a(d) is compelled by the First Amendment. Nevertheless, the government urges this Court to adopt an unconstitutionally vague "electioneering message" standard that, so far as appears, the FEC formulated without discussion or even awareness of First Amendment standards.[12] In so doing, the government offers no reason why political parties are entitled to less clarity than corporations.[13]

---

[11] The government declined to appeal the trial court's ruling that "Wirth Facts #1" was not "express advocacy." *See* Colorado Party Opening Brief at 3 n.3. The Colorado Party's Opening Brief (40-41) demonstrated that while the government represents (Br. 3) that generic appeals such as "Support Republicans for Congress" are not subject to FECA's contribution limits, the FEC has sought to expand the scope of the "express advocacy" test. Ignoring this Court's bright-line test, the Commission has determined:

> [M]essages such as "Vote Democratic" or "Vote Republican" will be evaluated on a case-by-case basis to determine whether they constitute express advocacy under the criteria set out in 11 CFR 100.22(b).

J.A. 251. Such a free-wheeling approach is contrary to this Court's teachings.

[12] None of the advisory opinions on which the government relies for the "electioneering message" standard even mention the First Amendment. The government has pointed to no other authority for its standard.

[13] The government's reliance (Br. 21-22) upon post-*Buckley* amendments to FECA to argue that Congress actually supports the "electioneering message" standard is unpersuasive. While Congress did not change the scope of § 441a(d)(3) at the time it defined "independent expenditures" to require "express advocacy," there is an obvious explanation. Congress created a new definition for "independent expenditures" because *Buckley* ruled that such a limiting construction was required by the Constitution. Because *Buckley* did not address the constitutionality of § 441a(d)(3) under the First Amendment, there was no Supreme Court ruling to codify.

Nor do the post-*Buckley* amendments support the government's contention (Br. 30-31 n.21) that § 441a(d)(3) has an anti-corruption purpose. The government has cited no congressional finding or concern that parties are corruptive.

The government claims (Br. 44-45) that people of "common intelligence" usually will be able to determine whether particular speech contains an "electioneering message," and that an FEC advisory opinion is available where the standard is unclear. It asserts that this is sufficient under *Broadrick v. Oklahoma*, 413 U.S. 601, 607 (1973). This argument fails at several levels.

First, *Buckley* expressly rejects a standard of "adequate notice to a person of ordinary intelligence," holding that "[w]here First Amendment rights are involved, *an even 'greater degree of specificity' is required*." *Id.* at 77 (emphasis added). Thus, the level of clarity that the government claims for its "electioneering message" standard is legally inadequate.

Second, the government's "electioneering message" standard blurs the critical distinction between advocacy of issues and advocacy of candidates. The core concern of the "express advocacy" test is to assure that issue advocacy is not chilled, even if some candidate advocacy must be allowed. *See MCFL*, 479 U.S. at 249 (discussing and applying the *Buckley* "express advocacy" test). As was explained in a recent opinion striking down the FEC's rulemaking attempt to import an electioneering message concept into the express advocacy test:

> [Under *Buckley* and *MCFL*,] FEC restriction of election activities was not to be permitted to intrude in any way upon the public discussion of issues. What the Supreme Court did was draw a bright line that may err on the side of permitting things that affect the election process, but at all costs avoids restricting, in any way, discussion of public issues. . . . The advantage of this rigid approach, from a First Amendment point of view, is that it permits a speaker or writer to know from the outset exactly what is permitted and what is prohibited.

Maine Right to Life Comm. v. FEC, 914 F. Supp. 8, 12 (1996) (invalidating 11 C.F.R. § 100.22(b)(2)).

The inherent difficulties with the government's "electioneering message" standard are starkly illustrated by the facts of this case. The Colorado Party's radio and print materials all discussed issues raised by the conduct of the same incumbent Congressman, Timothy E. Wirth. They were disseminated at the same time and shared a common objective. All were identified as coming from the Party. Yet only "Wirth Facts #1" is said to embody an "electioneering message."[14]

The government argues (Br. 45) that any vagueness concerns relating to the "electioneering message" standard are remedied through the FEC's advisory opinion process. This argument is untenable. This Court has never held that a scheme of advance licensing of political speech cures an unconstitutionally vague standard. Nor is such a scheme practical in this context. Political discourse is immediate and fluid, while the FEC may take up to 60 days to issue an advisory opinion. 11 C.F.R. § 112.4(a). By the time the need for FEC advice is perceived, a request for an advisory opinion is prepared, and the FEC issues an opinion, the vital political moment often will have passed.

---

[14] In the lower courts the government was unable to suggest any basis for distinguishing "Wirth Facts #1" from the Colorado Party's other similar ads and brochures. *See* Colorado Party's Certiorari Reply Brief at 3. In this Court the government offers two grounds of distinction (Br. 44 n.36). First, it says that only "Wirth Facts #1" "expressly" referred to Wirth's Senate Campaign. Yet the others ads and brochures also referred to statements then being made by the Wirth Campaign. Second, the government cites a press statement (J.A. 147-48) by the Colorado Party's Chairman. It never explains why that statement matters, but the statement applies equally to all of the Party's ads. The government cannot claim that a reasonable person, knowing that "Wirth Facts #1" would be condemned, confidently could conclude that the other ads and pamphlets would be permissible. An express advocacy standard would permit such a judgment.

Moreover, the entire exercise can be for naught. In this case, for example, aside from "Wirth Facts #1," the FEC divided three-to-three over whether the Colorado Party's other advertisements contained an "electioneering message." Four votes are needed to issue an advisory opinion. 11 C.F.R. § 112.4(a). Thus, if the Party had sought an advisory opinion here, it would have lost 60 days and gained no clarity. This is not an isolated example; the FEC regularly deadlocks in close cases.[15] Needless to say, close cases are when an advisory opinion would be most useful.[16]

As the Colorado Party Chairman testified:

> A political party is designed to do a lot of things. Among them is to help candidates . . . . For federal candidates, which come under the FEC, there are rules that to the average nonlawyer state chairman are so complex and so difficult *that many people just say I just won't play in that league.*

J.A. 215 (emphasis added). The government's regrettable adherence to the vague "electioneering message" standard compounds the problem, and the FEC has given no indication that it recognizes the serious constitutional concerns that this creates.[17] In order not to be unconstitu-

---

[15] *See, e.g.*, FEC Advisory Opinion 1985-14, J.A. 267-74 (deadlocking on whether an advertisement critical of the Reagan Administration's defense spending contained an "electioneering message" where the ads closed by saying "Vote Democratic").

[16] The government also asserts (Br. 43-44) the *non sequitur* that the "electioneering message" standard is appropriate because § 441a(d) is "not an additional restriction." The Colorado Party rejects the government's peculiar view that a political party has no right to speak absent an act of grace by Congress. But even if the government's premise were true, the Party still would be entitled to clear guidance as to what speech is permitted and what is not.

[17] The government apparently does not dispute that courts may not defer to agency rulings which, like the "electioneering message" standard, raise serious constitutional concerns and conflict with Supreme Court precedent. *See* Colorado Party's Opening

tionally vague, § 441a(d) must be limited to communications that satisfy this Court's bright-line "express advocacy" test.[18]

CONCLUSION

The First Amendment interests implicated by this case are profound.[19] A political party is nothing more than a group of people associated to promote public policies they believe in. They adopt a name for their group and hold themselves out to the public under that name. In order to promote their beliefs effectively, they nominate one of their own members for public office and support that individual's campaign with the expectation that the nominee will advance their shared beliefs. To deprive parties of

---

Brief at 41-46. Indeed, the only case cited by the government in support of deference being afforded to the FEC is *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27 (1981), in which the agency's decision not to prosecute actually expanded First Amendment rights. Conspicuously absent from the government's brief is any discussion of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Moreover, contrary to the government's assertion (Br. 25 n.19), the Colorado Party did argue below that the FEC's advisory opinions did not merit deference. *See* Colorado Party Certiorari Reply Brief at 2 n.2.

[18] Even if § 441a(d)(3) is limited to "express advocacy," the Colorado Party's facial challenge to the political party spending limits would remain. The Party seeks to vindicate its constitutionally protected right to engage in unlimited express advocacy.

[19] As noted in the Colorado Party's Opening Brief (at 3), § 441a(d) does not even permit the Party to pay to send one first-class mailing to every party member in Colorado. While the government correctly notes that parties may distribute certain materials to members if accomplished through "volunteer activities" (Br. 40 n.32), FEC regulations are so complex and restrictive as to make it often impractical for parties to comply. *See, e.g.*, J.A. 215. For instance, the regulations do not permit mailings to be accomplished by commercial vendors or from lists maintained by commercial vendors, which are the most cost-effective means of reaching members and voters. As the Chairman of the Colorado Party testified (J.A. 215), the difficulty of interpreting what constitutes "volunteer activity" also leads many parties to avoid relying upon the "volunteer activity" exception altogether.

the right to advocate expressly the election of their candidates robs them of their very purpose for being.

In ruling on campaign finance laws in the last 20 years, this Court has shown a sensitivity to such weighty interests. For instance, while recognizing that expenditures and contributions both implicate core First Amendment rights, the Court has given heightened scrutiny to expenditure limitations because of their more significant impact on speech. While limiting the ability of unions and business corporations to influence elections, the Court has consistently safeguarded the rights of individuals, candidates, PACs and other political organizations to speak without limit on electoral issues.[20]

What the Colorado Party seeks is a similar sensitivity to its interests. Though the government's novel contribution analysis tries to obscure the issue, there remains one principle at the core of this case: political party spending limitations, no matter how they are implemented, silence

---

[20] Even unions and business corporations have wider latitude to engage in unlimited speech than do political parties, as they may communicate to the general public so long as that speech falls short of "express advocacy," and is not coordinated with any federal candidate. *See MCFL*, 479 U.S. at 249. Moreover, while a party may not even send one letter to each of its members without violating § 441a(d), there is no limit upon a union's use of compulsory dues to communicate with its members, regardless of whether the communication is "express advocacy," and regardless of whether the communication is coordinated with candidates. *See United States v. Congress of Industrial Org.*, 335 U.S. 106 (1948). As noted in the Colorado Party's Opening Brief (at 6-7 n.5), the AFL-CIO has recently announced a $35 million campaign targeting candidates for the House of Representatives, which will be financed by a mandatory assessment on all member unions regardless of whether individual members prefer those candidates. *See* Frank Swoboda & Thomas Edsall, "AFL-CIO Endorses Clinton, Approves $35 Million Political Program," *Washington Post*, Mar. 26, 1996, at A6. This unlimited spending is in *addition* to the spending by the separate segregated fund of the AFL-CIO noted in the government's brief.

vital political speech for no discernable purpose. As such, they are unconstitutional.

* * * *

For the reasons stated herein and in the Colorado Party's Opening Brief, the Party respectfully requests that the judgment below be reversed.

Respectfully submitted,

JAN WITOLD BARAN
Counsel of Record
THOMAS W. KIRBY
CAROL A. LAHAM
MICHAEL E. TONER
SCOTT S. HARRIS

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006
(202) 429-7000
Attorneys for Petitioners

April 5, 1996